

**THE CLARK CONSTRUCTION  
GROUP, INC.**

**CONTRACT NO. V101BC-0036  
5676**

**VABCA-5673-**

**VA MEDICAL CENTER  
WEST PALM BEACH, FLORIDA**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY ON  
MOTION TO DISMISS FOR LACK OF JURISDICTION**

In response to the Board's Order To Show Cause (prompted by a Memorandum filed with the Board by the Government), Respondent, Department of Veterans Affairs, (VA or Government) asserts that the Board does not have jurisdiction to consider labor inefficiency claims related to Appellant's four subcontractors. As explained below, the Board has docketed these claims as VABCA-5673, 5674, 5675, and 5676. The Board, therefore, will treat the Government's Response to Board's Show Cause Order, filed on October 9, 1998 as a Motion To Dismiss the above four appeals.

The VA maintains that Appellant, The Clark Construction Group, Inc. (Clark) never submitted the claims underlying these appeals to the Contracting Officer (CO) for decision. Therefore, the VA asserts that, under the *Contract Disputes Act (CDA)*, we are without jurisdiction over these appeals. Clark opposes the Government's Motion, responding that it has met the *CDA* prerequisites because, in the two certified claims relating to these appeals, it made claims for impact, loss of productivity, and inefficiency.

**FINDINGS OF FACT FOR THE PURPOSE OF RULING  
ON THE RESPONDENT'S MOTION**

On April 2, 1996, the Board docketed Clark's appeal of the Contracting Officer's (CO) deemed denial of Clark's November 21, 1995 certified claim of \$6,170,374 as VABCA-4839. The November 1995 claim was for additional costs and additional contract performance time due to site contamination and site dewatering problems relating to Contract No. V101BC-0036 (Contract) for the construction of the Department of Veterans Affairs Medical Center at West Palm Beach, Florida (VAMC West Palm Beach).

On February 11, 1997, the Board docketed Clark's appeal of the CO's deemed denial of Clark's May 10, 1996 certified claim of \$3,857,438 as VABCA-5249. The May 1996

claim was for additional costs and contract performance time relating to the construction of VAMC West Palm Beach resulting from various causes other than the site decontamination and site dewatering issues.

Subsequent to the docketing of VABCA-4839 and VABCA-5249, the Board has redocketed those two appeals several times under the authority of *Placeway Construction Corporation v. United States*, 920 F.2d 903 (Fed. Cir. 1990) and at the request of the parties to reflect the numerous separate claims embodied therein. The Board also docketed several additional appeals arising out of Contract No. V101BC-0036 for the construction of VAMC West Palm Beach. In the course of these actions, VABCA-5249, by the Board's Order of May 15, 1997, without objection by either party, was redocketed and designated as "Delay, Disruption, Inefficiency Claims."

Both the November 1995 and May 1996 claims are extensive and detailed, involving hundreds of pages of analysis and documentation. In both its November 1995 and May 1996 claims, Clark identified "disruption," "inefficiency," and "non-productive labor" as causes giving rise to its entitlement to recover the amounts claimed. In addition, Clark provided several schedules, as part of the claims, supporting the quantum of its claims identifying labor productivity, non-productive labor, and labor and productivity impact costs.

In a September 16, 1998 memorandum to the Board, the VA requested a Prehearing Conference concerning the Board's jurisdiction over inefficiency claims of four Clark subcontractors that had been specifically identified in January 1998 and further definitized in July 1998 during the course of the parties' settlement discussions. The Board, on September 18, 1998, issued an Order To Show Cause to show why the Board either did not have jurisdiction over the inefficiency claims of the four subcontractors or why the claims were not within the scope of appeals arising out of Contract No. V101BC-0036.

On November 4, 1998, the Board redocketed the appeal in VABCA-5249 as VABCA-5249 and 5673-76. The appeals in VABCA-5673-76 were identified as follows:

DOCKET NUMBER	DESCRIPTION
VABCA NO. 5673	STRESSCON INEFFICIENCY
VABCA NO. 5674	POOLE & KENT INEFFICIENCY
VABCA NO. 5675	RJC & ASSOC. INEFFICIENCY
VABCA NO. 5676	ISEC INEFFICIENCY

The appeals in VABCA 5673-76 were also consolidated with the three previously docketed appeals arising out of the Contract still active. Stresscon, Poole & Kent, RJC & Associates, and ISEC are all Clark subcontractors.

Claims relating to Stresscon, Poole & Kent, RJC & Associates, and ISEC's performance on the VAMC West Palm Beach were identified in Clark's November 1995 and May 1996 claims. Specific identification of amounts and bases for the inefficiency related to these four subcontractors was provided to the VA in November 1997.

The Board has issued several Orders Of Judgment concerning appeals arising out of the VAMC West Palm Beach contract based on stipulated settlements. In these settlements the parties have mutually resolved inefficiency claims of other Clark subcontractors.

## DISCUSSION

Under the CDA, 41 U.S.C. §§ 601-613, for this Board to have jurisdiction over an appeal, a contractor must first have submitted a demand for a final decision to the contracting officer specifying the specific relief sought and the basis for that relief and demanding a sum certain or adjustment of contract terms. If the amount of payment demanded exceeds \$100,000, the claim must be certified. *D.C. Cab & Taxi Dispatch, Inc.*, VABCA No. 5482, 98-1 BCA ¶ 29720.

The Government asserts that Clark's November 1995 and May 1996 claims did not specify the inefficiency of the four subcontractors which are the subject of the four appeals here and were not even disclosed until November 1997. While the inefficiency claims related to these four subcontractors may have been further refined and detailed both as to entitlement and quantum during the course of prehearing and settlement proceedings, it is clear that Clark's November 1995 and May 1996 claims demanded payment of an equitable adjustment for additional labor costs of both Clark and its subcontractors resulting from Government-caused inefficiency in the construction of VAMC West Palm Beach. During the course of the proceedings in the appeals arising out of the Contract, evidenced by prehearing conferences, prehearing submissions, and settlements of other appeals, the parties and the Board have consistently recognized that labor inefficiency and disruption were within the scope of the issues to be resolved.

Neither an increase in the amount of Clark's claim nor a further refinement and detailing of the claim defeats our jurisdiction. Similarly, even if labor disruption and inefficiency could be characterized as a new theory of recovery, put forward after the VA's deemed denial, we would retain jurisdiction if disruption and inefficiency were within the general allegations of the November 1995 and May 1996 claims. Clark met its statutory obligation to specify its claim; subcontractor inefficiencies are within the allegations made in the extensive November 1995 and May 1996 claims. We have jurisdiction over these four appeals. *Cosmic Construction Co., Inc.*, VABCA No. 1504, 82-1 BCA ¶ 15696; *Westclox Military Products*, ASBCA No. 25,592, 81-2 BCA ¶ 15270; *Miya Brothers Construction*; 12 Cl. Ct. 142 (1987).

The documentary record in the appeals arising out of the Contract is currently hundreds of thousands of pages. A seven-week hearing, commencing on January 25, 1999, has been set for these appeals and the parties have been engaged in active, professional, and purposeful settlement discussions and extensive prehearing proceedings for over two years. By the Government's admission, Clark detailed these subcontractor inefficiency claims more than a year ago. Although a jurisdictional motion may be made at any time, we are puzzled why the Government, having knowledge of the specifics of

these inefficiency claims for more than a year, chose to wait until less than three months before the commencement of a lengthy and complex hearing before it identified the potential jurisdictional problem to the Board.

### **DECISION**

**For the foregoing reasons, the Respondent's Motion to Dismiss the appeals in VABCA-5673, 5674, 5675, and 5676, under Contract No. V101BC-0036, is Denied.**

**Date: November 16, 1998**

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**Richard W. Krempasky**  
**Administrative Judge**  
**Panel Chairman**

**We Concur:**

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**Guy H. McMichael III**  
**Chief Administrative Judge**

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**James K. Robinson**  
**Administrative Judge**